Supreme Court, U.S.
FILED

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No. 051133 DEC 27 2005

In the Supreme Court of the United States OFFICE OF THE CLERK

WEST PLAINS GRAIN, INC., d/b/a AMIGO FEEDERS,

Petitioner,

v.

CANADIAN RIVER LAND & CATTLE, INC., et al.,

Respondent.

v.

METROPOLITAN LIFE INSURANCE COMPANY, UNITED STATES OF AMERICA, ACTING THROUGH THE FARM SERVICE AGENCY, GOLD BANK, N.A., FIRST CAPITAL BANK, GUTHRIE, OKLAHOMA, BANKONE, N.A., CHERRYL LOVEJOY, DAVID JENSEN, ALLAN JENSEN BILL JENSEN, MILDRED JENSEN, DIANE MOORE FKA DIANE JENSEN,

Defendants/Appellees,

and

BRITTON ROAD SAND & GRAVEL, L.L.C. AND BRITTON AG PRODUCTS, L.L.C.,

Additional Defendants/Appellees.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court committed error when it refused to grant review of the decision of the Oklahoma Court of Civil Appeals holding that no consideration should be given to the decision of the Western District of Oklahoma finding that the documents underlying the foreclosure of Petitioner Canadian River Land & Cattle, Inc. were invalid, in violation of the Full Faith and Credit clause of the United States Constitution?

2. Whether the foreclosure proceeding undertaken against Canadian River Land & Cattle, Inc., violated principles of Due Process?

PARTIES

The parties to the action are:

West Plains Grain, Inc., d/b/a Amigo Feeders,
Canadian River Land & Cattle, Inc.,
Britton Road Sand & Gravel L[illegible]
Britton Ag Products LLC
Metropolitan Life Insurance Company
United States of America, acting through the Farm Service Agency,
Gold Bank, N.A., and
First Capital Bank, Guthrie, Oklahoma
BankOne, N.A.
Cherryl Lovejoy
David Jensen
Allan Jensen
Bill Jensen
Mildred Jensen
Diane Moore f/k/a Diane Jensen

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

1. On May 27, 2005, the Oklahoma Court of Civil Appeals affirmed the decision entered by the Oklahoma County Court.

2. No petition for rehearing was filed

3. A Petition for Certiorari in the Oklahoma Supreme Court was denied on September 27, 2005

JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision rendered on May 27, 2005 by the Oklahoma Court of Civil Appeals. No petition for rehearing was filed in the case, however, Petitioner sought Certiorari in the Oklahoma Supreme Court. That petition was denied on September 27, 2005, thus the time to file this Petition began to run on September 28, 2005. No extension to file for a writ of certiorari has been sought in this case. Jurisdiction is proper pursuant to Supreme Court Rule 10 (a), which allows the Court to assume jurisdiction in a case where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...".

STATUTORY PROVISIONS AT ISSUE

The Full Faith and Credit Clause provides that: Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof. U.S. Const., Art. IV, § 1.

The Full Faith and Credit statute provides in relevant part that:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.
28 U.S.C. § 1738.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case arises from a foreclosure action brought by West Plains Grain, Inc., d/b/a Amigo Feeders ("WPG"). The case was originally filed in the District Court of Canadian County, Case No. CJ-2001-408, and was heard by the Honorable Judge Edward Cunningham. Judgment was entered on the foreclosure against Petitioner Canadian River Land & Cattle, Inc. ("Canadian River") following a bench trial.

The property was subsequently sold at Sheriff's sale over the objection of Canadian River. Canadian River appealed the judgment to the Oklahoma Supreme Court. The appeal was heard and denied by the Oklahoma Court of Civil Appeals. A Petition for Certiorari was sought to the Oklahoma Supreme Court which was also denied.

While the state court litigation was being conducted, federal litigation was also in progress challenging the validity of the documents which formed the basis for the mortgage which was being foreclosed. Following the entry of judgment in the Canadian County case, the Honorable Lee R. West, sitting in the Western District of Oklahoma ruled that the documents executed in connection with the

mortgage conveyed by Canadian River were ultra vires, and thus unenforceable. The Oklahoma Courts have refused to properly consider the effect of the federal judgment on the Canadian County foreclosure, in violation of the requirements of full faith and credit as well as res judicata.

The decision entered by the Oklahoma Court of Appeals requires review by this Court because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" as contemplated by U.S.Sup.Ct. Rule 10, 28 U.S.C.A. Additionally, the decision of the Oklahoma Court of Civil Appeals completely departed from the accepted and usual course of appellate proceedings such that this Court should intervene.

FACTUAL MATTERS

Canadian River is an Oklahoma corporation engaged in a variety of agricultural enterprises. The company's operations primary took place on property located just outside the city limits of El Reno, Oklahoma in Canadian County. The property is comprised of approximately 1,200 surface acres and 1,000 mineral interest acres.

Canadian River farmed alfalfa and hay on the property, as well as cattle. Canadian River grazed its own cattle and for the account of others. From time-to-time, Canadian River fed cattle for itself and others in a feed lot fully permitted ans licensed by the State of Oklahoma and the EPA, located on the Canadian River property.

The property at issue is located adjacent to the North Canadian River and the souther boundary of the property generally follows the river. The principal owners of Canadian River sought to maximize the operations by utilizing, to the extent possible, the naturally occurring assets found in and on the 1,200 acres of attractively located and bountifully endowed land in Canadian County. In order to raise operating capital, Canadian River executed a series of mortgages on the surface property as well as the mineral interests, to several entities; Metropolitan Life Insurance Company ("MetLife"), United States of America, acting through the Farm Service Agency ("USA"), Gold Bank, N.A., and First Capital Bank, Guthrie, Oklahoma ("First Capital"). In at least one case, that of MetLife, the income from oil and gas production went directly to the lender to service the debt.

As part of the management activity, Canadian River routinely obtained appraisals which covered various aspects of the company's operations in an attempt to manage and enhance the feasibility of its ongoing operations on the property. Appraisals were obtained from four (4) independent, unaffiliated professionals. A geological evaluation was prepared by William McCasland, Consulting Geologist in August of 1999 in connection with a proposed sand excavation operation planned by Canadian River. An economic analysis of the same project was conducted by J. W. Hoyt & Associates in April of 2001. Record, 85, Exhibits "A" through "D."

The geological evaluation indicated that the property would support the production of 7,500,000 tons of concrete sand at a range of sale prices from $5.75 to $9.00 per ton. This level of production suggests a potential gross value of $43, 125,000.00 to $68, 250,000.00 under the terms and conditions described in the appraisal. The first and second appraisal taken together indicate a net present value of a proposed sand excavation operation with a projected net value of $2,300,000.00. The appraisal by Pryor found the estimated

market value of the surface interest, in an "as is" condition in 2002, to be $2,461,500.00.

The mineral interests were appraised in 2001 at a value of $330,000.00. The valuation included all combined oil and gas mineral tracts.

Ultimately, judgment was entered in favor of WPG in the amount of $445,000.00 on February 13,2002. Record, 22. Judgment in favor of MetLife was entered in the amount of $684,064.17 on April 8, 2003. Additional judgments were awarded to the other lenders at other times.

Following the filing of the foreclosure petition, three independent appraisers were appointed to appraise the property. Based on the opinions of those court-appointed appraisers rendered in May of 2003, the property was valued at $2,132,500.00. Record, 45.

The property was sold at Sheriff's sale on October 6, 2003. A single bidder purchased the property for the amount of $1,740,000.00. The sale included the surface and all mineral interests.

Record, 78. WPG assigned its interest in the property to Bob Funk and Nedra Funk and sought confirmation of the sale. Record, 81.

Canadian River timely objected to the confirmation of the sale. The objection was overruled and an order confirming the sale was entered on October 30, 2003. This appeal is from that order.

PROPOSITION I

AS A RESULT OF AN INTERVENING FEDERAL COURT JUDGMENT, THE FORECLOSURE WAS MOOT. FULL FAITH AND CREDIT REQUIRES THAT THE OKLAHOMA COURTS APPLY THE FEDERAL JUDGMENT.

During the pendency of the foreclosure action, a federal case for rescission of the mortgage documents was also proceeding. Although the foreclosure action reached judgment first, a judgment in the federal case was entered after the initiation of this appeal.

In the federal case, Judge Lee R. West determined, on Appellee's Motion for Summary Judgment, that the principal for Petitioner, Allan Jensen, lacked the capacity to execute certain documents giving rise to the contract with WPG. The Court, in

holding that the acts of Jensen were ultra vires, invalidated many of the mortgage documents.

Given this conclusion in the federal case, it must now be found in this case that the judgment and sale in the foreclosure action, based on the same set of documents at issue in the federal action, are moot. Because the federal court found that the execution of the documents were ultra vires, it follows that those same documents will not support a judgment for foreclosure. Undeniably, the principal purpose for which United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among federal courts and state courts concerning meaning of provisions of federal law. ***Braxton v. United States***, 500 U.S. 344 (1991). This case is ripe for such intervention.

The federal court findings from the Western District must be given preclusive effect in this case. Justice Harlan made clear the rationales for issue preclusion in ***Southern Pacific R.R. v. United States***, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897). There he said:

> The general principle ... is that a right, question, or fact put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery,

> cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

Generally, under principles of collateral estoppel, once a federal court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of that issue in a federal suit on a different cause of action involving a party or its privy to the first case. See ***Montana v. United States***, 440 U.S. 147, 153, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979). The Supreme Court has recognized that both res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication. ***Id.*** **at 153-54.**

The Court has even expanded the reach of collateral estoppel in particular, finding the policies underlying it to apply in cases beyond those formerly governed by the common law on the subject.

For example, the Court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided in earlier suits. See ***Blonder-Tongue Lab., Inc. v. University of Ill. Found.***, 402 U.S. 313, 345-49, 28 L.Ed.2d 788, 91 S.Ct. 1434 (1971). Clearly, the law supports the prevention of inconsistent results as well as judicial economy.

In the present case, the ruling of the federal court became absolutely final and completely binding between the parties the deadline to appeal passed without action by any party. See 12 O.S. § 681. The present case, the subject of this appeal, is obviously not final, thus is it is subject to the application of estoppel doctrines. Because the federal judgment is final, the doctrine of "law of the case" should prohibited the entry of judgment against Canadian River in the foreclosure action.

It is important to distinguish the difference between the doctrines of res judicata and collateral estoppel and the application of the "law of the case." In Oklahoma, res judicata bars a second action where the parties and the two causes of action are the same. Where the two causes of action are different, the litigants are estopped by

judgment with respect to any and all issues which are common to both suits. Estoppel by judgment is applicable when the second suit is between the same parties but on a different cause of action. See ***Wabaunsee v. Harris***, 610 P.2d 782, 785 (Okla.1980). See also, ***Veiser v. Armstrong***, 688 P.2d 796, 800 n. 9 (Okla.1984).

The law of the case rule bars relitigation of issues after they have been finally settled by another court of competent jurisdiction and the opportunity for review by an appellate court has either been undertaken or waived. ***Eaton Enterprises, v. Oklahoma***, 2003 OK 14, 65 P.3d 277; ***Patel v. OMH Medical Center, Inc.***, 1999 OK 33, 22, 987 P.2d 1185, 1195; ***Wilson v. Harlow***, 1993 OK 98, 12, 860 P.2d 793, 797. The doctrine absolutely bars relitigation of any issue that the aggrieved party failed to raise on appeal. See ***Mobbs v. City of Lehigh***, Okl., 655 P.2d 547, 549 n. 5 (1982); ***Panama Processes v. Cities Service Co.***, Okl., 796 P.2d 276, 283 n. 27 (1990). Absent an appeal, the judgment is deemed finally settled. ***Handy v. City of Lawton***, Okl., 835 P.2d 870, 873 (1992); see also ***Jones v. Medlock***, 201 Okl. 109, 202 P.2d 212, 214 (1949).

The settled issues include all questions existing in the record and involved in the decision either directly or by implication. ***Cinco Enterprises, Inc. v. Benso***, 1999 OK 80, 995 P.2d 1080; ***Shoemaker v. Estate of Freeman***, 1998 OK 17, 15, 967 P.2d 871, 875. The doctrine applies when the facts and issues are materially or substantially the same in both appeals, or where new testimony is merely cumulative. ***Gay v. Hartford Underwriters Ins. Co.***, 1995 OK 97, 18, 904 P.2d 83, 88.

The purpose of the doctrine is a rule of judicial economy designed to prevent a court from dealing with the same issue on more than one occasion. ***Patel v. OMH Medical Center, Inc.***, 1999 OK 33, 22, 987 P.2d 1185, 1194-95. See also ***Mehdipour v. Holland***, 2000 OK 22, 9, 18 P.3d 339; *Jackson v. Jones*, 1995 OK 131, 37, 907 P.2d 1067, 1074. ***Fent v. Oklahoma Natural Gas Co.***, 1995 OK 108, 13, 898 P.2d 126, 133.

The doctrine applies to the subsequent action regardless of the fact that the record of the previous action is not part of the record in the second litigation. ***Cinco Enterprises, Inc. v. Benso***, 1999 OK 80, 10, 995 P.2d 1080. The truth and correctness of the previous

judgment is never an issue when the law of the case doctrine is applied. This Court recognized this effect when it held in both ***Sand Springs Home v. State, ex rel. Dept. of Highways***, 536 P.2d 1280, 1284 (Okl.1975) and ***Billy v. LeFlore Co. Gas & Elec. Co.***, 146 Okl. 227, 293 P. 1009, 1014 (1930):

> Equity will not intervene to protect one against an erroneous judgment who has failed to avail himself of an appeal.

The essential result of the final judgment is that a party is bound by that judgment and all it entails and is especially applicable when the judgment becomes final without an appeal.

In this case, the federal judgment was based on Appellee's confession that the acts of Canadian River in the execution of mortgage documents was ultra vires. It follows that if the documents were executed without appropriate authority, such that consideration was refunded to Appellee, then those same documents may not form the basis of a judgment for another purpose.

This Court must find that the federal judgment, entered before the present judgment has been finalized, must render the foreclosure action moot. A similar situation was address by the Court in ***Williams***

v. Ross, 1924 OK 125, 97 Okla. 119. In that case, the Court considered the effect of a judgment from one jurisdiction on a foreclosure action in another.

This Court held:

> When an examination of the record discloses that the execution under which a sheriff's sale was made is void, it follows that all subsequent proceedings including the order of confirmation of the sale are null and of no effect; and it is not error for the court to set aside the order of confirmation of sale on motion calling the court's attention to the invalidity of the execution.

The conclusion of the Court could not be more clear: "If the execution was void, the order of the court setting aside the order of confirmation was correct, regardless of who owned the property."

Based on the above and foregoing, this Court should find that the execution against the Canadian River property was void and that any further action in the case would be moot given the federal conclusions with respect to the validity of the documents underlying the foreclosure.

At a minimum, the case should be remanded to the trial court for consideration of the federal judgment and its effect on the foreclosure.

When the Oklahoma Courts failed to give full faith and credit to the federal court decision, Petitioner was denied an important constitutional right. This Court should exercise its discretion and grant review by way of certiorari in this case.

PROPOSITION II

THE APPRAISAL CONDUCTED IN THIS CASE DID NOT COMPLY WITH DUE PROCESS. THE DECISIONS OF THE OKLAHOMA COURTS VIOLATE THE LAWS OF THE UNITED STATES.

The Due Process Clause of the Fifth Amendment represents a constitutional protection of an individual's right to, and a safeguard against unwarranted government deprivations of, three fundamental, core, textural interests--life, liberty, and property. U.S. Const. amend. IV; XIV. The Amendment operates as an important barrier against arbitrary abuses of governmental authority. ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992); ***Collins v. Harker Heights***, 503 U.S. 115, 126-27 (1992); ***Daniels v. Williams***, 474 U.S. 327, 331 (1986). In this context, government actions that deprive persons of life or liberty are unconstitutionally arbitrary when they have no

appropriate justification or take place without any regard for the regularity of governmental processes.

The duty of deliberation and inquiry--a fair and appropriate decision-making process--prior to a Government's action against life, liberty and property is the special office of procedural due process. See, e.g., ***Maihews v. Eldridge***, 424 U.S. 319 (1976); ***Goldberg v. Kelly***, 397 U.S. 254 (1970). At a minimum, the principles seek to "minimize the risk of erroneous decisions." ***Greenholtz v. Inmates of Nebraska Penal and Correctional Complex***, 442 U.S. 1, 13 (1979). Quite simply, the Constitution's "fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property" or as the case may be, deprivations of life. ***TXO Prod. Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 2728 (1993) (Stevens, J.) (plurality opinion).

In this case, the Oklahoma Courts, at both appellate and district level, completely failed to exercise their jurisdiction in a manner designed to protect Petitioner's guaranteed right to Due Process. The denial of constitutional rights began from the outset of the foreclosure proceedings.

Because of a variety of procedural issues, the Sheriff's sale on the Canadian River property was delayed from the first scheduled date. The property was appraised by the Sheriff following the first order of sale.

Oklahoma law is very specific with respect to the requirements of a court-ordered appraisal. In 12 O.S. §759(B), the legislature provided:

> If a general or special execution is levied upon lands and tenements, the sheriff shall endorse on the face of the writ the legal description and shall have three disinterested persons who have taken an oath to impartially appraise the property levied on, upon actual view; and the disinterested persons shall return to the officer their signed estimate of the real value of the property.

In the present case, it is impossible to determine from the face of the appraisal if the requirements of the statute have been met. Due process demands that Courts apply the law of a state in a uniform and consistent manner.

Although there are three signatures on the face of the appraisal, there are no addresses listed for any of the appraisers. It is impossible to determine whether these appraisers reside in Canadian

County or elsewhere. Additionally, the document is silent with respect to the qualifications of any of the appraisers to determine the value of a multi-use property such as that owned by Canadian River.

Most importantly; however, is the absence of any mention of the value of the 1005 acres, located in different parts of three section, of mineral interests. Neither is there any valuation indicated of the construction grade concrete sand business, despite the clear indication of the viability of the project as considered by a truly independent, qualified appraiser in 2001. The absence of these two important and valuable aspects of the property must be fatal to the confirmation of the forced sale.

Major components of the value of this property were totally disregarded by the trial court and were not addressed in the Order of Confirmation. In the Order, the trial court completely ignored the appraisals produced by Canadian River and used only the court-ordered appraisal. The court did not discuss Canadian River's valuation, nor did it make any attempt to discuss the reasons for its disregard for those appraisals.

While there are very few cases arising out of Oklahoma which consider the adequacy of an appraisal, some guidance can be found in ***Rodolf v.. First Nat. Bank & Trust Co. Of Tulsa***, 1938 OK 245, 182 Okla. 426, 78 P.2d 296. In that case, this Court held:

> It would appear that an appraisement may be attacked for fraud, 23 C.J. p. 465, § 278, and it may be that gross inadequacy of value fixed in the appraisement, such as to shock the moral sense, coupled with a showing of slight irregularities, may constitute constructive fraud and sustain an attack upon an appraisement, the same as such showing may sustain an attack upon the sale as determined in the cited cases. ***Miller v. Gray Eagle Oil & Gas Co. et al.***, 164 Okl. 259, 23 P.2d 657.

Additional support for the proposition that an erroneous appraisal, leading to an inequitable sales price, requires the reversal of the confirmation order is found in ***Moss***, 1990 OK 50, 793 P.2d at 1364. The Court held:

> A confirmation's reversal is proper when (1) the sale price is so grossly inadequate that it shocks the conscience of the court; (2) the sale price is grossly inadequate and the sale is tainted by additional circumstances; or (3) the result is inequitable to one or more of the parties before the court, whether owner, purchaser, or creditor. (Footnotes omitted).

In a footnote to the opinion, the Court explained:

> As a general rule mere inadequacy of consideration is not sufficient ground for setting aside a sheriff's sale, but all of the authorities hold uniformly that when gross inadequacy of consideration, coupled with very slight additional circumstances, is sufficient to set aside such sale, and that where the consideration is so grossly inadequate as to shock the conscience of the court, or is very great, it is alone sufficient. *Id.* (Emphasis added.) This rule is generally uniform in this country and in England. See ***Gelfert v. National City Bank of New York***, 313 U.S. 221, 232, 61 S.Ct. 898, 902, 85 L.Ed. 1299 [1941]. See also numerous sources for the rule in ***State v. Harrower***, 167 Okl. 269, 29 P.2d 123, 125-130 (1934).

The opinion in ***Gelfert v. National City Bank of New York***, 313 U.S. 221, 232, 61 S.Ct. 898, 902, 85 L.Ed. 1299 (1941) is particularly applicable in this case. The Court held:

> . . . the control of judicial sales of realty by courts of equity and by legislatures in order to prevent sacrificial prices has a long history. . . . And it is quite uniformly the rule in this country , as in England, that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience if there are additional circumstances against its fairness. . . . [F]or about two centuries there has been a rather continuous effort either through general rule or by appeal to the chancellor in specific cases to prevent the machinery of judicial sales from becoming an instrument of oppression. . . .

> Underlying that change has been the realization that the price which property commands at a forced sale may be hardly even a rought measure of its value. (Citations omitted).

The reason for such a rule is founded on constitutional considerations of due process. The Court continued:

> Mortgagees are constitutionally entitled to no more than payment in full . . . the use of the criterion of fair and reasonable market value in cases where they obtain the property for a lessor amount holds promise of tempering the extremes of both inflated and depressed market prices. [S]o far as mortgagors are concerned, it offers some assurance that they will not be saddled with more than the amount of their obligations. To hold that mortgagees are entitled under the contract clause to retain advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. (Citations omitted).

Quite clearly, an appraisal which fails to include the valuation for the entire property and all its uses results in an inequitable sale of the property. The purchaser of the property is able to obtain more value for the purchase price than should be afforded while the foreclosed owner of the property is prevented from benefitting from his equity position.

In the present case, the unreasonably low appraisal provided complete relief for all the complaining creditors, but did not allow

Canadian River to recover any of the equity which a proper appraisal would have yielded. This is a completely unfair result and must be found to be contrary to the Constitution and Oklahoma law.

Based on the evidence contained in the record, it is clear that the Canadian River property should have appraised for a total value of $5,091,500.00. Instead, the incomplete, court ordered appraisal resulted in a valuation of $2,132,500.00. The difference in the amounts is more than significant. By relying on an unreasonable appraisal, the trial court effectively denied Canadian River the value of more than half of the property.

The net effect of the inequities involved in the forced sale of Canadian River's property is to force Canadian River to pay its debts more than three times over the amount owed. Canadian River was denied due process and the failure of the appellate courts to remedy the situation demands that this Court exercise its discretion and accept jurisdiction in this case.

PROPOSITION III

THE SALE MUST BE SET ASIDE BECAUSE THE SALE PRICE WAS BELOW THAT REQUIRED BY OKLAHOMA LAW.

As noted in detail above, there is no question that the appraised value, as determined by the trial court, of the Canadian River property was constitutionally inadequate. Because the appraisal was not sufficient, the sale of the property for two-thirds of the low appraised value is contrary to Oklahoma law.

In 12 O.S. § 762, the Oklahoma legislature provided that the forced sale of property must bring at auction at least two-thirds of the appraised value. Certainly the legislature intended that proportion to be of a properly appraised property. Any other conclusion invites certain fraud on the court and toward the parties.

In this case, the property sold for $1,740,000.00. Two-thirds of the actual value of the property would have required a sale price of $3,360,390.00. The inequity of these two different prices illustrates all the principals discussed by the various courts addressed in the previous proposition.

The appraisal in the present case undeniably did not consider the value of the mineral interests or the sand excavation business. The trial court refused to address these issues when it overruled Canadian River's objection to the confirmation of the sale.

Because the appraisal used by the trial court was so clearly inadequate, it cannot be said that the property sold for two-thirds of the proper appraised value, thus denying Canadian River the benefit of due process of law. This Court should intervene in the action and the order Oklahoma courts to act in a manner consistent with the Fifth Amendment guarantees of Due Process.

CONCLUSION

This case presents issues of significant importance. The decisions of the Oklahoma Supreme Court, the Oklahoma Court of Civil Appeals and the District Court of Canadian County violate important principles of law from this Court. The Court should exercise its discretion and grant Canadian River's request for review of these decisions.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TUESDAY, SEPTEMBER 27, 2005

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

99,942 In the Matter of the Petition of Paula Sophia Schonauer Paula Sophia Schonauer
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J., Lavender, Hargrave, Kauger, Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

99,974 State of Oklahoma, ex rel., Drew Edmondson, Attorney General, et al. v. Cemetery Company, Inc.
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J., Lavender, Hargrave, Kauger, Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

100,042 West Plains Gran, Inc., d/b/a Amigo Feeders v. Canadian River Land and Cattle, Inc., et al.
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J., Lavender, Hargrave, Kauger, Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

100,453 General Accessory Manufacturing Company by Real Parties in Interest
Ben Chatham, et al. v. Oklahoma Tax Commission
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J.,

Lavender, Hargrave, Kauger,
Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

100,471 Jerry Merz and Rosa Lee Merz, husband and wife, guardians and next friend of Richard Merz, an adult person v. State of Oklahoma, ex rel. Oklahoma Department of Human Services
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J.,
Lavender, Hargrave, Kauger,
Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

100,579 Carol Lovell v. Stephanie Chappelle, in her capacity as Chairman of the Oklahoma Pardon and Parole Board, ex rel., State of Oklahoma
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J.,
Lavender, Hargrave, Kauger,
Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

100,704 (Cons w/ 101,0999) Ella M. Hanner, Personal Representative of the Estate of Troy Keith Mainord, Deceased v. General Motors Corporation
Petition for certiorari is denied.
CONCUR: Watts, C.J., Winchester, V.C.J.,
Lavender, Hargrave, Kauger,
Edmondson, Taylor, Colbert, JJ.
ABSENT: Opala, J.

/s/ Joseph M. Watt
Chief Justice

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

West Plains Grain, Inc. dba Amigo Feeders

Plaintiff/Appellee,

v.

Canadian River Land & Cattle, Inc.,

Defendant/Appellant,

v. Case Number: 100042

Metropolitan Life Insurance Company, United States of America, acting through the Farm Service Agency, Gold Bank, M.A., First Capital Bank, Guthrie Oklahoma, Bankone, N.A., Cherryl Lovejoy, David Jensen, Allan Jensen, Bill Jensen, Mildred Jensen, Diane Moore fka Diane Jensen

Lower Court Case No.
CJ-2001-408
Lower Court: CANADIAN

Defendants/Appellees,

and

Britton Road Sand & Gravel, L.L.C. and Britton AG Products, L.L.C.,

Additional Defendants/Appellees.

MANDATE

Pursuant to Rules 1.183 and 1.16, Oklahoma Supreme Court Rules, 12 O.S. Supp. 1997, Ch. 15, App. 1, on the 20th day of October, 2005, the Honorable Chief Justice Watt directed the Clerk of the Supreme Court to issue mandate in the above styled and numbered cause.

On the 27th day of May, 2005, the Supreme Court of Oklahoma of the State of Oklahoma promulgated an Opinion in the above styled and numbered cause. Appeal was taken from District Court of CANADIAN County. On appeal, the following judgment was entered.

Affirmed and Remanded

Costs of $0.00 are taxed and allowed pursuant to 12 O.S. 1991 §978 and rule 1.14(a), Oklahoma Supreme Court rules, 12 O.S. Supp. 1997, Ch. 15, App. 1.

Therefore, the Judge of the District Court of CANADIAN County, State of Oklahoma, is ordered to enter of record the judgment of the Supreme Court of Oklahoma. The Judge of the District Court of CANADIAN County shall issue process or take further action as required by the Opinion issued.

MICHAEL S. RICHIE
Clerk of the Appellate Courts

By Meredith Moman, Deputy

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

West Plains Grain, Inc. dba Amigo Feeders

Plaintiff/Appellee,

v.

Canadian River Land & Cattle, Inc.,

Defendant/Appellant,

v. Case Number: 100042

Metropolitan Life Insurance Company, United States of America, acting through the Farm Service Agency, Gold Bank, M.A., First Capital Bank, Guthrie Oklahoma, Bankone, N.A., Cherryl Lovejoy, David Jensen, Allan Jensen, Bill Jensen, Mildred Jensen, Diane Moore fka Diane Jensen

Lower Court Case No.
CJ-2001-408
Lower Court: CANADIAN

Defendants/Appellees,

and

Britton Road Sand & Gravel, L.L.C. and Britton AG Products, L.L.C.,

Additional Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY, OKLAHOMA

HONORABLE EDWARD C. CUNNINGHAM, TRIAL JUDGE

AFFIRMED AND REMANDED

James P. Cates, Baer & Timberlake, P.C. Oklahoma City, Oklahoma and Sarah A. Hall, J. Matthew Thompson Mock, Schwabe, Waldo, Elder, Reeves & Bryant Oklahoma City, Oklahoma	For Plaintiff/Appellee West Plains Grain, Inc., d/b/a Amigo Feeders
Charles B. Davis Oklahoma City, Oklahoma	For Defendant/Appellant Canadian River Land & Cattle, Inc.,
Mark W. Kuehling Oklahoma City, Oklahoma	Fro Defendant/Appellee Metropolitan Life Insurance Company
Robert G. McCampbell United States Attorney Kay Sewell, Assistant US Attorney Oklahoma City, Oklahoma	For Defendant/AppelleeUnited States of America, Acting through the Farm Service Agency
Julia C. Rieman Gungoll, Jackson, Collins, Box & Devoll, P.C. Enid, Oklahoma	For Defendant/Appellee Gold Bank, N.A.
Joe M. Anthis Joe M. Anthis, P.C. Oklahoma City, Oklahoma	For Additional Defendant/Appellees Britton Road Sand & Gravel, LLC and Britton Ag Products, LLC

Opinion by Kenneth L. Buettner, Chief Judge:

¶1 Defendant/Appellant Canadian River Land & Cattle Company, Inc. Appeals from the order confirming sheriff's sale entered in a foreclosure action brought by Plaintiff/Appellee West

Plains Grain, Inc., d/b/a Amigo Feeders (Amigo Feeders).[1] Because we find no abuse of discretion, the trial court's decision to confirm the sale is affirmed.

¶2 The following facts are undisputed. From 1991 to 2001, Appellant executed and delivered a series of mortgages on the subject real property to various lenders. In 1998, Appellant granted a mortgage on the real property to Amigo Feeders to secure the payment of a promissory note. Appellant defaulted on its obligation and Amigo Feeders sought to foreclose its mortgage. In 2002, Appellant and Amigo Feeders entered into an agreed journal entry of judgment which reduced the indebtedness to judgment, foreclosed the mortgage and ordered the property sold upon special execution, order of sale and notice of sale. Additional judgments were awarded to the other lenders prior to and during these proceedings. Amigo Feeders caused the special execution and order of sale and notice of sale. Additional judgments were awarded to the other lenders prior to and during these proceedings. Amigo Feeders caused the special execution and order of sale to issue. The real property was appraised for $2,132,500.00 by the court appointed appraisers. The trial court provided notice of the sheriff's sale. Appellant's several attempts to stay the sheriff's sale were denied or defeated.[2]

¶3 The property was sold at sheriff's sale for $1,740,000.00 to Amigo

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[1] The other parties captioned above were named as Defendants or Additional Defendants in the foreclosure action. Defendants Cherryl Lovejoy, David Jensen, Bill Jensen, Mildred Jensen, and Diane Moore f/k/a Diane Jensen disclaimed any and all right, title or interest in the subject real property. Allan Jensen, First Capitol Bank, Guthrie, Oklahoma, and BankOne, N.A., have not entered an appearance in this appeal. The remaining Defendants/Appellees and Additional Defendants/Appelee entered an appearance in the instant appeal. Both Amigo Feeders and Defendant/Appellee Gold Bank, NA (Gold Bank) filed answer briefs. Defendant/Appellee Metropolitan Life Insurance Company (MetLife) waived its right to file a brief pursuant to *Supreme Court Rule* 1.10(a)(5), 12 O.S. 2001, Ch. 15, App. 1, and adopted the arguments and authorities submitted by Amigo Feeders.

[2] Appellant's motion to stay the sheriff's sale was denied. Appellant also filed a notice of filing bankruptcy in the instant case. It is undisputed Appellant's bankruptcy action was dismissed.

Feeders as the only bidder. This bid price exceeded two-thirds of the appraised value. Amigo Feeders assigned all its interest in the real property to Nedra and Robert Funk and moved to confirm the sheriff's sale. Appellant lodged an objection thereto. Appellant did not dispute the foreclosure proceeding was regularly conducted in compliance with Oklahoma law. Instead, Appellant contended the appraisal failed to represent the fair market value of the real property and that the bid price for the real property was grossly inadequate. The trial court overruled Appellant's objection and entered its order confirming the sheriff's sale. Appellant appeals from that order.

¶4 As a preliminary matter, we reiterate that confirmation of a foreclosure sale is within the trial court's discretion. *United Oklahoma Bank v. Moss*, 1990 OK 50, ¶19, 793 P.2d 1359, 1364. Consequently, the trial court's order will not be disturbed unless it is "abusive of the lawful discretion." Id.

¶5 We now address Appellant's allegations or error. Initially, we reject Appellant's contention that the court-ordered appraisal, which is silent as to the appraisers' addresses and qualifications, failed to meet the requirements of 12 O.S. 2001 §759(B). Section 759 (B) provides:

> If a general or specific execution is levied upon lands and tenements, the sheriff shall endorse on the fact of the writ the legal description and shall have three disinterested persons who have taken an oath to impartially appraise the property levied on, upon actual view; and the disinterested persons shall return to the officer their signed estimate of the real value of the property.

Section 759(B) does not require that the appraisal contain the three appraisers' addressed or qualifications. In addition, the trial court specifically addressed the appraisers' qualifications and found the three disinterested persons selected by the sheriff were qualified and competent appraisers who have performed hundreds of court-ordered appraisals in Canadian County over many years.

¶6 Appellant next urges the trial court erred when it confirmed the sale, which was based on the sheriff's appraisal, because the sheriff's appraisal undervalued the property by neglecting to consider all the uses and aspects of the property. As support, Appellant urges the actual fair market value of the property, considering all its potential uses and underlying mineral interests, is in excess of $5,000,000.00. Appellant arrived at this figure by adding together three separate appraisals of the property. The first appraisal indicted the value of the real property would be $2,300,000.00 if the property were used for a proposed sand and gravel excavation operation. The second appraisal indicated a surface value for real estate development of $2,461,500.00. Appellant's third appraisal indicated a value of $330,000.00 for the underlying mineral interests.

¶7 Amigo Feeders counters that the trial court property rejected Appellant's valuation because the sand and gravel excavation operation is very speculative in that it requires a capital infusion of $1,000,000.00 - which debtor does not have - and a minimum of four years of returns. Therefore, the appraisal based upon such proposed excavation operation is not reflective of the current value of the real property. Amigo Feeders also produced a 2002 appraisal of the real estate, minerals and improvements prepared by Nichols Appraisal Associates which reflected a value of $2,275,350.00.

¶8 Gold Bank also disputes Appellant's valuation of the real property. Gold Bank urges it is inappropriate to add the value of the mineral interests, the "as is" surface value, and the speculative excavation value to arrive at a total value because the "as is" surface value assumes the gravel and sand would remain in place. In addition, both Amigo Feeders and Gold Bank point out Appellant's asserted value contradicts its representation in its 2003 Chapter 12 bankruptcy schedules which indicated the value of the real property is $2,500,000.00.

¶9 After reviewing the record and applicable law, we reject Appellant's contention that the trial court erred when it failed to adopt Appellant's real property appraisals and valuation method. "The only test a court can have of the value of property sold at a forced sale is the price it would bring on due notice at a public sale fairly

conducted." *City of Wewoka ex rel. North v. Fink*, 1946 OK 296, ¶13, 173 P. 2d 936, 939, quoting *State ex rel. Comm'rs of Land Office v. Harrower*, 1934 OK 50, 29 P.2d 124. Therefore, it was not error for the trial court to reject appraisals which value the real property at some remote or future time after the property has been developed or utilized for more profitable uses. Consequently, the trial court acted within its discretion when it gave more weight to the sheriff's appraisal than to Appellant's appraisals and when it accepted the sheriff's appraisal as the reasonable value of the real property.

¶10 For its second proposition of error, Appellant urges the sale must be set aside because the sale price was below the amount required by Oklahoma law. Mere inadequacy of the bid price, unaccompanied by other circumstances of fraud or irregularity, is not a sufficient reason for refusing to confirm a foreclosure sale. *City of Wewoka* at ¶12, 173 P.2d at 939. Confirmation reversal is only proper when:

> (1) the sale price is so grossly inadequate that it shocks the conscience of the court; (2) the sale price is grossly inadequate and the sale is tainted by additional circumstances; or (3) the result is inequitable to one or more of the parties before the court, whether owner, purchaser or creditor.

Moss at ¶20, 793 P.2d at 1364 (emphasis in original). Appellant does not claim the sale was tainted by additional circumstance. Appellant contends only that the price for the property was so grossly inadequate that the court's conscience should have been shocked and the sale set aside.

¶11 Here, the sheriff sold Appellant's property for $1,740,000.00. Appellant's bankruptcy schedule valued the property at $2,500,000.00. Appellant's independent appraisals indicated the surface value was $2,461,500.00 and the mineral interest value was $330,000.00. The sale price here represented approximately 69% of the value of the property as represented on Appellant's bankruptcy schedule and 2% of Appellant's independent appraised value for the surface and minerals. The property sold for more than two-thirds of the sheriff's appraised value (82% of $2,132,500.00) as required by

12 O.S. 2001 §762. In addition, the property sold for more than two-thirds of the Nichols Appraisal Associates' appraised value of $2,275,350.00. Under these circumstances, we cannot find the sale price was so grossly inadequate that it shocks the conscience of this Court. Accordingly, we hold the trial court's confirmation order was not clearly erroneous or an abuse of discretion.

¶12 Appellant's final proposition of error seeks to vacate the underlying foreclosure judgment in favor of Amigo Feeders on the assertion that an intervening federal court judgment renders the foreclosure judgment moot. There is no record of the federal court judgment in the appellate record. Yet, Appellant requests this Court to take judicial notice of the federal court proceeding. We decline to do so. While this Court may take judicial notice of its own records in litigation interconnected with a case before it, we cannot take judicial notice of its own records in litigation interconnected with a case before it, we cannot take judicial notice of records in litigation interconnected with a case before it, we cannot take judicial notice of records in other courts. *Salazar v. City of Oklahoma City*, 1999 OK 20, ¶11, 976 P.2d 1056, 1061.

¶13 Notwithstanding the omission of the federal court judgment roll from this appellate record, Appellant urges the foreclosure judgment should be vacated because all parties admit to the existence and effect of the federal judgment in their briefs. Admissions made in briefs may be considered as supplementing and curing an otherwise deficient appellate record. *See Brock v. Thompson*, 1997 OK 127, 948 P.2d 279, 283 n.4. However, there is no consensus here as to the factual basis, effect and import of the federal judgment. For example, Appellant urges the federal action sought the recision of Amigo Feeders' mortgage documents. Whereas, Amigo Feeders and Gold Bank both claim Appellant mis-characterizes the basis of the federal action and ensuing judgment. These lenders assert the federal judgment rescinds an option/first right agreement which was executed by Defendant/Appellee Allan Jensen on behalf of Appellant and granted to Amigo Feeders, but that the federal judgment has no effect on the initial mortgage documents of either lender. Based on the foregoing substantive disagreement, we decline to find the deficient record was cured by the parties' "admission" in their briefs.

Accordingly, Appellant's third allegation of error is rejected.

¶14 Defendant/Appellee Gold Bank requests appeal-related attorney fees in its response brief. Whenever there is statutory authority to award attorney fees in the trial of a matter, additional fees may be allowed to the prevailing party for legal services rendered in the appellate court. *Sisney v. Smalley*, 1984 OK 70, ¶20, 690 P.2d 1048, 1051. Title 42 O.S. 2001 §176[3] provides the statutory authority to award Gold Bank its attorney fees as prevailing party on its claim for foreclosure of its mortgage. Accordingly, Gold Bank's motion for appeal-related attorney fees is granted. The trial court is directed to conduct a hearing to determine Gold Bank's reasonable appeal-related attorney fees.

¶15 AFFIRMED AND REMANDED.

HANSEN, J., and JOPLIN, P.J., concur.

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[3] 42 O.S. 2001 §176 provides:
"In an action brought to enforce any lien the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action."

No. 05-1133

Supreme Court, U.S.
FILED
APR 7 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CANADIAN RIVER LAND & CATTLE, INC.,

Petitioner,

v.

WEST PLAINS GRAIN, INC., d/b/a AMIGO FEEDERS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Third Division

RESPONDENT WEST PLAINS GRAIN, INC., d/b/a AMIGO FEEDERS, BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

Whether Petitioner has articulated a compelling reason to justify discretionary review by this Court.

Whether Petitioner may properly challenge the validity of the Judgment entered in the Foreclosure Proceeding and, if so, whether the Judgment is valid and/or has been ratified by Petitioner.

Whether the Appraisal of the Property in the Foreclosure Proceeding satisfied the requirements of Oklahoma law.

Whether the sale price of the Property in the Foreclosure Proceeding was adequate under Oklahoma law.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent, West Plains Grain, Inc., d/b/a Amigo Feeders, is a privately held Kansas corporation, having no parent corporation or publicly held company owning 10% or more of the corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

On June 1, 1998, Petitioner, Canadian River Land & Cattle, Inc. ("Canadian River"), made, executed and delivered to Respondent, West Plains Grain, Inc., d/b/a Amigo Feeders ("Amigo"),[1] a promissory note in the principal amount of $325,000.00 ("Note"). Pursuant to the terms of the Note, all principal and accrued, unpaid interest were due and payable in full on June 1, 1999. To secure payment of the Note, Canadian River made, executed, and delivered to Amigo a real estate mortgage ("Mortgage") covering certain real property located in Canadian County, Oklahoma ("Property"). Canadian River subsequently defaulted on the Note and Mortgage, and, on August 30, 2001, Amigo commenced an action in the District Court for Canadian County, Oklahoma (the "District Court"), seeking judgment on the Note and foreclosure of the Mortgage (the "Foreclosure Proceeding").

On February 13, 2002, Amigo and Canadian River entered into an Agreed Journal Entry of Judgment in the principal amount of $290,000.00, together with interest in the amount of $155,000.00, for a total sum of $445,000.00, with interest accruing thereon from the date of entry of judgment at the statutory rate until paid, all title expenses, reasonable attorney's fees in the amount of $7,500.00, and all costs ("Judgment").

Pursuant to a Special Execution and Order of Sale, issued by the District Court on October 23, 2002, the

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[1] Canadian River has mistakenly designated Amigo as the Petitioner in the caption of the case as originally filed. In fact, Canadian River is the Petitioner, and Amigo is the Respondent, in this appeal.

sheriff of Canadian County was ordered to levy upon, cause to be appraised, and sell the Property. A Valuation and Appraisement of Property was filed on May 9, 2003 ("Appraisal"). As reflected on the face of the court-ordered Appraisal, three (3) disinterested appraisers residing in Canadian County, Oklahoma, F. Dale Bynum, Sandra Bynum, and Kelly Davis, appraised the value of the Property at $2,132,500.00.

On June 13, 2003, Canadian River filed a Notice of Filing Bankruptcy, indicating that Canadian River had filed a Chapter 12 bankruptcy case in the United States Bankruptcy Court for the Western District of Oklahoma (the "Bankruptcy Case"). Canadian River's Bankruptcy Case was subsequently dismissed with prejudice by the Bankruptcy Court on July 30, 2003.

On September 8, 2003, Amigo filed an Affidavit of Mailing of Notice of Sheriff's Sale in the District Court. On September 8, 2003, an Affidavit of Publication was filed, indicating that a Notice of Sheriff's Sale, set for October 6, 2003, was properly and timely published in the *Yukon Review* on September 3 and 10, 2003.

On October 6, 2003, the Property was sold at a sheriff's sale to Amigo, being the highest bidder, for $1,740,000.00, said amount being more than two-thirds of the appraised value of the Property ($2,132,500.00). On October 6, 2003, Amigo filed and served a Notice of Hearing setting the hearing on the Motion to Confirm Sale for October 22, 2003.

On October 7, 2003, Amigo filed an Assignment of Judgment and Bid, Motion to Confirm Sale and Notice of Hearing, assigning Amigo's Judgment and bid to Robert A. Funk and Nedra R. Funk, requesting confirmation of the

sheriff's sale and requesting that the sheriff execute a deed to the Property to Robert A. Funk and Nedra R. Funk.

On October 17, 2003, Canadian River filed its Objection to Confirmation of Sheriff's Sale ("Objection"). In its Objection, Canadian River asserted that, based on certain speculative valuations and/or economic analyses, the value of the Property was purportedly in excess of $5,000,000.00 and, as such, the sheriff's sale should be set aside because the sale price was inadequate.

On October 22, 2003, Amigo filed Plaintiff's Response to Defendant's Objection to Confirmation of Sheriff's Sale ("Response"). As part of its Response, Amigo attached copies of Canadian River's bankruptcy schedules filed in the Bankruptcy Case which reflected a value of the Property of $2,500,000.00. Amigo also attached to its Response an appraisal conducted by Nichols Appraisal Associates on behalf of Canadian River, dated December 27, 2002, which valued the Property, including the minerals, at $2,275,350.00 (the "Nichols Appraisal").

On October 22, 2003, after hearing arguments of counsel and considering the evidence, the District Court sustained Amigo's Motion to Confirm Sale and entered its Order Confirming Sale on October 30, 2003.

On November 20, 2003, Canadian River appealed the Order Confirming Sale. The Oklahoma Court of Civil Appeals unanimously affirmed the District Court's Order Confirming Sale. Canadian River's Amended Petition for Certiorari to the Oklahoma Supreme Court was subsequently denied without opinion.

Canadian River now seeks to appeal from the Oklahoma Supreme Court's decision denying Canadian River's Amended Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. Canadian River has not Articulated a Compelling Reason to Justify Discretionary Review by this Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." SUP. CT. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* In its Petition for Writ of Certiorari ("Petition"), Canadian River has not presented any compelling reason for this Court to exercise discretionary jurisdiction over Canadian River's appeal of the Oklahoma Supreme Court's decision denying Canadian River's Amended Petition for Writ of Certiorari.

II. The Judgment is Valid and Canadian River may not Challenge its Validity in this Court.

For Proposition I of its Petition, Canadian River contends that the Judgment entered into between Amigo and Canadian River on February 13, 2002, is moot.

As a preliminary matter, this appeal results from the District Court's Order Confirming Sale. Thus, "[i]n passing upon whether a sale of real estate on execution should be confirmed, the court is limited to the regularity of the sale proceedings and may not properly inquire into the regularity of the judgment." *Grayson v. Sec. Fed. Sav. & Loan Ass'n of Tulsa*, 134 P.2d 555, 556 (Okla. 1943) (emphasis

added); *see also Anson v. Anson*, 36 P.2d 915, 917 (Okla. 1934) ("In objection to confirmation of mortgage foreclosure sale, only questions pertaining to proceedings in sale, and not matters relating to judgment or title to property, should be considered.").

Nevertheless, Canadian River's contention concerning the validity of the Judgment is based on an erroneous interpretation of an Order from the United States District Court for the Western District of Oklahoma (the "Federal Court"). Moreover, Canadian River's contention is both improper and untimely.

A. Canadian River Mischaracterizes the Federal Court's Order.

Canadian River's proposition that the Judgment is moot is based on an Order entered by the Federal Court on February 18, 2004, in Case No. CIV-03-194-W, styled *Canadian River Land & Cattle Corp., Plaintiff v. West Plains Grain, Inc., Defendant* (the "Federal Court Action"). Canadian River grossly mischaracterizes the Federal Court's Order entered in the Federal Court Action.

In January 2002, in an attempt to settle disputes raised in the Foreclosure Proceeding, Canadian River and Amigo entered into an agreement pursuant to which, among other things, (i) Canadian River executed an Agreed Journal Entry of Judgment in favor of Amigo (i.e., the Judgment), (ii) Canadian River granted Amigo an option, and the right of first refusal, to purchase the Property for $1,800,000.00 in consideration of the payment of $70,000 by Amigo to Canadian River (the "Option/First Right Agreement"), and (iii) Amigo agreed not to cause the

scheduling of an execution sale of the Property upon the Judgment prior to August 1, 2002.

On January 21, 2003, Canadian River commenced an action in the District Court based ***solely*** upon the **Option/First Right Agreement**, and requested that (i) any transfer of the Property pursuant to the Option/First Right Agreement be enjoined, (ii) the Option/First Right Agreement be declared void, and (iii) a monetary sum be awarded to Amigo to place it in *status quo ante*. Canadian River's petition was silent with respect to the validity of the Judgment. Amigo removed the case to the Federal Court on February 13, 2003, thereby initiating the Federal Court Action.

The Federal Court's Order – the sole basis for Canadian River's contention that the Judgment is moot – addressed only the Option/First Right Agreement, and declared that Allan Jensen's execution of the Option/First Right Agreement on behalf of Canadian River exceeded his corporate authority. **The Order did not address in any manner the validity of the Judgment.**

In fact, the Federal Court did not have jurisdiction to address the validity of the Judgment – a state court judgment – in the Federal Court Action. Pursuant to the *Rooker-Feldman* doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of a state judgment in a United States [trial] court." *See, e.g., Abboud v. Abboud*, 237 B.R. 777, 780 (B.A.P. 10th Cir. 1999); *Weaver v. Boyles*, 172 F. Supp.2d 1333, 1338 (D. Kan. 2001). Jurisdiction to review valid state court judgments lies exclusively with the state courts and, ultimately, with the United States Supreme Court. *Abboud*, 237 B.R. at 780.

The Federal Court's Order did not – and could not – address the validity of the Judgment. Canadian River's proposition that the Judgment is moot based on the Federal Court's Order, therefore, must be rejected.

B. Canadian River Did Not Preserve for Appellate Review its Contention that the Judgment is Moot.

Even if the Federal Court's Order provided a basis for Canadian River's contention that the Judgment is moot (which it does not), the Order was not included as part of the record on appeal to the Oklahoma Supreme Court. Canadian River, therefore, did not preserve the issue for appellate review.

Generally, review of an issue on appeal is confined to the record presented to the appellate court. *Wofford v. Mental Health Serv., Inc.*, 946 P.2d 1149, 1152 n.4 (Okla. 1997); *Krokowski v. Henderson Nat'l Corp.*, 917 P.2d 8, 10 (Okla. 1996); *Saxon v. Macy*, 795 P.2d 101, 102 (Okla. 1990); *Lawrence v. Cleveland County Home Loan Auth.*, 626 P.2d 314, 315 (Okla. 1981). Canadian River failed to include the Federal Court's Order in the record on appeal to the Oklahoma Supreme Court. In this regard, the Oklahoma Court of Civil Appeals stated in its Opinion:

> Appellant's final proposition of error seeks to vacate the underlying foreclosure judgment in favor of Amigo Feeders on the assertion that an intervening federal court judgment renders the foreclosure judgment moot. There is no record of the federal court judgment in the appellate record. Yet, Appellant requests this Court to take judicial notice of the federal court proceeding. We

> decline to do so. While this Court may take judicial notice of its own records in litigation interconnected with a case before it, we cannot take judicial notice of records in other courts.
>
> Notwithstanding the omission of the federal court judgment roll from this appellate record, Appellant urges the foreclosure judgment should be vacated because all parties admit to the existence and effect of the federal judgment in their briefs. . . . However, there is no consensus here as to the factual basis, effect and import of the federal judgment. . . . [W]e decline to find the deficient record was cured by the parties' "admissions" in their briefs. Accordingly, Appellant's third allegation of error is rejected.

Petition, Appendix, Opinion at ¶¶ 12-13.

Based on the foregoing, Canadian River failed to preserve for appellate review any consideration of its contention that the Judgment is moot, and Canadian River's contention may not now be properly considered by this Court.

C. Canadian River Ratified the Judgment.

Even if this Court could properly consider Canadian River's contention that the Judgment is moot, Canadian River ratified the Judgment by its actions (or inactions) in the Foreclosure Proceeding and in the Federal Court Action.

Although the Federal Court's Order was not entered until February 18, 2004, Canadian River initiated what would become the Federal Court Action in January 2003. Thus, as early as January 2003, Canadian River was

clearly aware of the facts which Canadian River now claims are the grounds for declaring the Judgment moot. Yet, Canadian River never once challenged or objected to the validity of the Judgment in the Federal Court Action. Additionally, in November 2003 and after the commencement of the Federal Court Action, counsel for Canadian River approved – without objection – two journal entries of judgment in the Foreclosure Proceeding, both of which specifically recited that the Judgment had been entered. Canadian River now claims that the Judgment is moot.

It is well settled under Oklahoma law that a principal must, within a reasonable time, repudiate the unauthorized act of his agent if he does not intend to be bound thereby. *Price v. Peeples*, 168 P. 191, 193 (Okla. 1917). Long acquiescence without objection, and even silence of the principal, will in many cases amount to a conclusive presumption of the ratification of an unauthorized act. *Id.*

In this case, Canadian River ratified the Judgment by not raising the issue as to its validity during the Federal Court Action, and by approving without objection two journal entries of judgment in the Foreclosure Proceeding which expressly stated that the Judgment had been entered. *See id.* at 194 (where the defendant made her codefendant an agent and the defendant knew that her codefendant had authorized the entry of judgment without the defendant's consent, but made no protest and was silent for over seven months until judgment was about to be enforced by sale of realty, such silence was evidence that the defendant fully ratified the acts of her codefendant and the judgment).

D. Collateral Estoppel is Not Applicable.

Canadian River seems to suggest that the Oklahoma Supreme Court, and now this Court, is bound by the Federal Court's Order under the doctrine of collateral estoppel.

The doctrine of collateral estoppel provides that a final judgment is conclusive in a subsequent action between the parties on a different claim as to issues raised in the subsequent action which were **actually litigated and determined in the prior action**. *Trimble v. Kindrick*, 852 P.2d 758, 760 (Okla. Civ. App. 1992) (emphasis added). An issue is actually litigated if it is properly raised in the pleadings or otherwise submitted for resolution, and in fact decided. *Isokariari v. Hillcrest Med. Ctr.*, 33 P.3d 691, 693 (Okla. Civ. App. 2001). An issue is necessarily determined if the judgment would not have been rendered but for the ruling on that issue. *Id.*

The party relying on a claim of issue preclusion bears the burden of establishing that the prior litigation actually determined the question of fact sought to be precluded. *Carris v. John R. Thomas and Assoc., P.C.*, 896 P.2d 522, 528 (Okla. 1995). The test is whether the question or fact in issue in the second action is a question or fact which was actually determined in the first adjudication. *Id.*

The doctrine of collateral estoppel is inapplicable in the present case for at least one very simple reason – the Federal Court's Order did not address the validity of the Judgment. The issue regarding the validity of the Judgment, therefore, was not (and could not be) "actually litigated" in the Federal Court Action. Thus, Canadian River's claim that this Court is bound by the Federal Court's Order vis-à-vis the validity of the Judgment

pursuant to the collateral estoppel doctrine is completely without merit.

E. The "Law of the Case" Doctrine is Not Applicable.

Canadian River also seems to suggest that, under the "law of the case" doctrine, this Court should find that the Judgment is moot. Again, the "law of the case" doctrine is inapplicable in this proceeding.

The "law of the case" doctrine bars relitigation of issues that have been settled by a previous appellate opinion **in the same case**. *Shoemaker v. Estate of Freeman*, 967 P.2d 871, 875 (Okla. 1998) (emphasis added); *see also Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 283 n.27 (Okla. 1990) (The "settled-law-of-the-case" doctrine operates to bar relitigation of issues that have been settled by an earlier appellate opinion **in that case**.) (emphasis added); *Wilson v. Harlow*, 860 P.2d 793, 797 (Okla. 1993). In addition, the "law of the case" doctrine is not controlling where the facts and issues are different in subsequent proceedings. *Eaton Enter. v. City of Oklahoma City*, 65 P.3d 277, 280 (Okla. 2003).

In this case, the "law of the case" doctrine is inapplicable for two reasons. First, the Federal Court's Order did not address the validity of the Judgment and, therefore, any issue regarding the validity of the Judgment has not previously been litigated. Second, the Federal Court Action was a separate proceeding from this case, and the facts and issues involved in the two cases are different. Thus, by definition, the "law of the case" doctrine has no application in this case. Canadian River's arguments and authorities to the contrary are simply inapposite.

F. The District Court Previously Rejected Canadian River's Contention that the Judgment is Moot.

Finally, Canadian River requests that "[a]t a minimum, this case should be remanded to the trial court for consideration of the federal judgment and its effect on the foreclosure." In fact, on July 2, 2004, Canadian River filed in the Foreclosure Proceeding a Motion to Vacate Judgment and Brief in Support Thereof, requesting that the District Court vacate the Judgment on the same grounds urged herein, i.e., that the Judgment is moot pursuant to the Federal Court's Order. On July 21, 2004, the District Court denied Canadian River's motion.

Based on the foregoing, the District Court previously considered the effect of the Federal Court Order on the validity of Judgment and rejected Canadian River's arguments. Remand to the District Court is, therefore, unnecessary.

III. The Foreclosure Proceeding Satisfied Due Process Principles.

In Propositions II and III of its Petition, Canadian River asserts generally that the Foreclosure Proceeding and, in particular, the court-ordered Appraisal, did not satisfy federal due process standards. Canadian River's assertion is not supported by the record or applicable law.

A. The Appraisal was Proper.

Canadian River first alleges that the court-ordered Appraisal did not meet the statutory requirements of 12 OKLA. STAT. § 759 because the Appraisal did not include

either the addresses or the qualifications for the three appraisers. Pursuant to 12 OKLA. STAT. § 759:

> If a general or special execution is levied upon lands and tenements, the sheriff shall endorse on the face of the writ the legal description and shall have three disinterested persons who have taken an oath to impartially appraise the property levied on, upon actual view; and the disinterested persons shall return to the officer their signed estimate of the real value of the property.

12 OKLA. STAT. § 759(B).

Contrary to Canadian River's allegations, 12 OKLA. STAT. § 759(B) does not require that the Appraisal contain the three appraisers' addresses or qualifications. However, the face of the Appraisal did indicate that the three appraisers were "[d]isinterested householders, residing in Canadian County, State of Oklahoma." In addition, during the hearing on the Motion to Confirm Sale, the District Court specifically addressed the appraisers' qualifications and found them to be qualified and competent appraisers who had performed hundreds of court-ordered appraisals in Canadian County, Oklahoma:

> The three disinterested persons who were selected by the sheriff, F. Dale Bynum, Sandra Bynum, and Kelly Davis. I'm sure all of you probably know F. Dale Bynum. Mr. Bynum is a senior appraiser and teaches the course to the people who teach the course to the real estate development people and appraisers. He's been used by this Court and appointed by this Court in excess of probably 500 appraisals or condemnation actions and has testified before this Court for the full 23 years, almost, that I've been on the

> bench. I'm well-familiar with the quality of his work.
>
> I bring that because the record would be silent as to that other than the fact of the Court's knowledge. I also know the other two individuals. They are three people who have been appointed by the sheriff for quite a number of years on doing sheriff's appraisals. Mr. Bynum is licensed, and he has the highest licensing requirement. He does appraisals for the Federal Government all over, as well as state and private appraisals. He's a very eminently qualified appraiser. I think probably one of the best in the state of Oklahoma.

Canadian River's contention that the Appraisal failed to meet the requirements of 12 OKLA. STAT. § 759(B) is without any legal basis.

Canadian River next complains that the Appraisal was defective because it did not include the value of the Property's mineral interests or certain speculative geological/economic valuations of a proposed concrete sand business in connection with the Property. Canadian River does not cite any authority for the proposition that an appraisal of property for purposes of a sheriff's sale must include any future, speculative uses of the property. Moreover, Canadian River raised the very same argument during the hearing on the Motion to Confirm Sale. In response, the District Court first noted:

> What's your response to the speculative nature? Some of the letters you've got in support of your valuation of the sand, etc., are principally businesses that conduct business in this area and the letters basically – some of them are even unsigned – just simply state something that my

> company uses 42 million pounds of sand valued at six-thirteen a pound, or we have a contract with all the Wal-Mart stores in Oklahoma and Kansas and somewhere else, and we use that. There's no actual contracts signed or stating that we are in contract with Canadian River Land and Cattle for the sand at this amount. It, to me, appears to be a speculation also as pointed out by . . . Mr. Kuehling, that there was a million dollar necessity to build up this business, and I thought it was with a return of not less than four years. That, to me, appears to be in the nature of some speculation as to what this property could be worth if it was utilized for these purposes. The problem we've got here is that it had not been utilized for those purposes and that business hasn't been put into effect and that it's all mere speculation.

After considering the arguments of counsel, the District Court concluded:

> So the issue, really, comes down to the law that was cited in this issue about is the sale price based on that evaluation or appraisal, is that going to be shocking to the conscience of the Court. . . . When you consider the other issues that have been presented and the bankruptcy evaluations that were used – and I understand that that's not an appraisal, but it is a statement used for purposes of the Bankruptcy Court as a valuation of the property by Canadian River Land and Cattle, Incorporated. The fact that that was done with or without counsel, I don't see anything that's ill-advised about it. That was a position taken by them in the Bankruptcy Court. The Bankruptcy Court relied on that position. The sale value when considered to those

amounts, still meets the requirements of the two-thirds figure.

> The Court at this time would find that the sale price does not shock the conscience of the Court when I look at the totality of the stated valuations of the properties. The future, I think, is too speculative in nature for this Court to accept. So based on that, at this time, the Court is going to overrule the objection to the confirmation of sheriff's sale, specifically finding that the sale price does not shock the conscience of the Court, that there is a record that supports the appraisal value given by the three disinterested appraisers, commissioners, and that the property was properly noticed, it was sold at public sale, and that there is nothing in that process that I think was inappropriate. I think it was done correctly.

Canadian River contends that the District Court "completely ignored" Canadian River's speculative valuations and did not "make any attempt to discuss the reasons for its disregard" of those valuations. *See* Petition at 20. To the contrary, the District Court fully considered the arguments of counsel regarding this issue and made express findings on the record as to why it would not consider the speculative valuations urged by Canadian River.

Agreeing with the District Court, the Oklahoma Court of Civil Appeals stated in its Opinion:

> After reviewing the record and applicable law, we reject Appellant's contention that the trial court erred when it failed to adopt Appellant's real property appraisals and valuation method. "The only test a court can have of the

> value of property sold at a forced sale is the price it would bring on due notice at a public sale fairly conducted." *City of Wewoka ex rel. North v. Fink*, 1946 OK 296, ¶13, 173 P.2d 936, 939, quoting *State ex rel. Comm'rs of Land Office v. Harrower*, 1934 OK 50, 29 P.2d 124. Therefore, it was not error for the trial court to reject appraisals which value the real property at some remote or future time after the property has been developed or utilized for more profitable uses.

Petition, Appendix, Opinion at ¶ 9.

B. The Sale Price of the Property was Adequate.

For its final proposition of error, Canadian River alleges that the sale of the Property must be set aside because the sale price was below the amount required by Oklahoma law.

A sheriff's sale may be set aside when (1) the sale price is so grossly inadequate that it shocks the conscience of the court, (2) the sale price is grossly inadequate and the sale is tainted by additional circumstances, or (3) the result is inequitable to one or more of the parties before the court. *First Fed. Sav. and Loan Ass'n, Chickasha, Oklahoma v. Nath*, 839 P.2d 1336, 1343 n.37 (Okla. 1992). It is the court's duty, whether confirming or setting aside a sheriff's sale, to protect all parties concerned. *Id.* The sale must appear to be fair and proper in all essential respects. *Id.*

Mere inadequacy of price, not accompanied by other circumstances of fraud or irregularity, is not a ground for refusal to confirm a foreclosure sale unless such price is so

grossly inadequate as to shock the conscience of the court. *City of Wewoka ex rel. North v. Fink*, 173 P.2d 936, 939 (Okla. 1946). In this case, Canadian River did not raise during the Foreclosure Proceeding any circumstances of fraud or irregularities concerning the sale of the Property. Canadian River contends only that the sale price of the Property was so grossly inadequate that the District Court's conscience should have been shocked and the sale set aside.

Under Oklahoma law, when property is appraised, as provided by 12 OKLA. STAT. § 759, and is sold at a price not less than two-thirds of the appraised value, as provided by 12 OKLA. STAT. § 762, the sale is valid, and the court is precluded by force of statute from inquiring into the adequacy of the sale price so long as the appraisement is permitted to stand. *Rodolf v. First Nat'l Bank & Trust Co. of Tulsa*, 78 P.2d 296, 298 (Okla. 1938). In this case, as reflected by the Appraisal, the value of the Property was appraised at $2,132,500.00. The Property was sold to Amigo, being the highest bidder, for $1,740,000.00, said amount being more than two-thirds of the appraised value of the Property (82%) as required by 12 OKLA. STAT. § 762. In addition, the sale price of the Property represented approximately 69% of the value of the Property as reflected on Canadian River's own bankruptcy schedules ($2,500,000.00), and approximately 82% of the value of the Property (including the minerals) as reflected by the Nichols Appraisal – Canadian River's own independent appraisal. Under these circumstances, the sale price of the Property was not so grossly inadequate so as to shock the conscience of the District Court. *See* Petition, Appendix, Opinion at ¶ 11.

The sale of property under foreclosure is a judicial sale, and the order of confirmation is a final and binding judgment of the court. *Berke v. Home Owners' Loan Corp.*,

134 P.2d 346, 347 (Okla. 1943). A trial court's judgment upon a motion to confirm a judicial sale will not be disturbed on appeal unless it affirmatively appears the trial court abused its discretion. *See United Oklahoma Bank v. Moss*, 793 P.2d 1359, 1364 (Okla. 1990); *Schave v. New York Life Ins. Co.*, 94 P.2d 892, 893 (Okla. 1939); *Drummond v. James*, 300 P. 658, 659 (Okla. 1931).

Based on the foregoing arguments and authorities, it is clear that the District Court did not abuse its discretion when it sustained Amigo's Motion to Confirm Sale and entered its Order Confirming Sale on October 30, 2003. As such, the Oklahoma Supreme Court's denial of Canadian River's Amended Petition for Certiorari was proper.

CONCLUSION

Respondent, West Plains Grain, Inc., d/b/a Amigo Feeders, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner, Canadian River Land & Cattle, Inc.

Respectfully submitted,

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05-1133 No.

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SUPREME COURT, U.S.

In the Supreme Court of the United States

CANADIAN RIVER LAND & CATTLE, INC., et al.,

Petitioner,

v.

WEST PLAINS GRAIN, INC., d/b/a AMIGO FEEDERS,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The purpose of this Reply is to address the issues raised by Respondent West Plains Grains, Inc., d/b/a Amigo Feeders ("Respondent") in its Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Canadian River Land & Cattle ("Petitioner" or "Canadian River"). Specifically, Petitioner seeks to focus this Honorable Court's attention on specific issues which demonstrate that error of such a substantial nature occurred in the Oklahoma state court proceedings that this Court must exercise its jurisdiction to ensure that justice is properly carried out in this case. Additionally, several of the legal arguments asserted by Respondent in its defense are not applicable to any issue in this case.

This Court's rules are very clear that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." One of the reasons specified by the Court, in subsection (a), allows this Court to exercise its jurisdiction in this case because the actions of the Oklahoma appellate courts have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup.Ct.R.10, 28 U.S.C.A.

When this Court weighs the facts and circumstances presented in this case with the fundamental interests of justice and due process, it will become apparent that intervention by this Honorable Court is necessary for several reasons, including the complete denial of due process during the foreclosure

proceedings conducted by the trial court and in the manner in which the appellate review was conducted by both the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court.

Based on the argument and authority presented, this Court is respectfully requested to grant Petitioner's request for a Writ of Certiorari and find that Oklahoma has failed to ensure due process through its judicial processes in foreclosure situations.

PROPOSITION I

THE STATE COURT ERRED WHEN IT FAILED TO CONSIDER THE PRECLUSIVE EFFECT OF THE FEDERAL JUDGMENT.

One of the primary issues raised in this Petition involves the effect of a federal court decision in the Western District Court of Oklahoma, which was entered subsequent to the entry of judgment in the District Court of Canadian County, Case No. CJ-2001-408. The essential finding in the federal litigation was that many of the documents instrumental in the transactions which occurred between these parties were improperly executed by an owner of Canadian River. The Court found that mortgage documents executed by Alan Jenson were ultra vires and were, thus, not enforceable.

Based on the federal court judgment, Petitioner attempted to obtain relief in the state court, both at the district and appellate level. Notwithstanding the request for relief in the

trial court based on subsequent federal court findings, the Oklahoma Court of Civil Appeals failed and refused to acknowledge the existence of the federal Order because it had not been made a part of the record by the trial court. This refusal was a clear violation of due process, denying Petitioner the right and opportunity to an appeal of right of a decision in a trial court against him.

Respondent asserts that this Court is barred from consideration of the issues raised with respect to the federal judgment for a variety of reasons. None of those reasons are sufficient to require this Court to refuse jurisdiction in the case.

A. The *Rooker-Fedman* Doctrine is Not Applicable in This Case.

The ***Rooker-Feldman*** doctrine is an aid in the interpretation of the Supreme Court's jurisdiction as defined by statute in 28 USCA § 1257. The doctrine holds that as a general rule, federal courts are barred from providing direct review in the lower federal courts of a decision reached by the highest state court, since such authority is vested solely in the United States Supreme Court. ***ASARCO, Inc. v Kadish***, 490 US 605, 104 L Ed 2d 696, 109 S Ct 2037 (1989).

Under the ***Rooker-Feldman*** doctrine, a lower federal court has no jurisdiction to review the final judgment of a decision entered by the highest court in a particular state court, since review of such a determination is an exercise of appellate jurisdiction, available only in the United States Supreme Court.

It is clear from the above cited authority that the focus of the ***Rooker-Feldman*** doctrine is on the authority of a United States District Court to entertain a challenge to a final state court decision. This is true even when the challenge allege that the state court's action was unconstitutional; review of those decisions may be had only in the United States Supreme Court. ***District of Columbia Court of Appeals v Feldman***, 460 US 462, 75 L Ed 2d 206, 103 S Ct 1303 (1983).

Based on the above analysis, it is clear that the ***Rooker-Feldman*** doctrine applies only when a federal district court attempts to act in a manner which would constitute an improper effort by a litigant to appeal a state court judgment. Filing a new action attacking the state court judgment in the federal district court is improper based on the rules established by ***Rooker-Feldman***. That situation did not occur in the present case.

In fact, the situation addressed by the Supreme Court in ***ASARCO, Inc.*** 490 US at 619, is conclusive in the present case. The Court held:

> We also conclude that "the record shows the existence of a genuine case or controversy essential to the exercise of the jurisdiction of this Court." ***Tileston v. Ullman***, 318 U.S. 44, 46, 63 S.Ct. 493, 494, 87 L.Ed. 603 (1943). These parties remain adverse, and "valuable legal rights ··· will be directly affected to a specific and substantial degree by the decision of the question of law." (Citation omitted).

Concurrent with the foreclosure action filed in Canadian County, the federal court litigation testing the documents supporting the mortgage and other transactions associated with the proceedings between the parties to this litigation was commenced. It is not denied by any party that the federal litigation held that Jenson did not have the authority to execute documents on behalf of Petitioner, yet no appellate level court has considered the effect of that judgment on the foreclosure action entered in Canadian County.

B. Petitioner was Denied Due Process When the Lower Courts Refused to Consider the Effect of the Federal Judgment on the Canadian County Foreclosure Judgment.

As noted in the Respondent's Brief in Opposition, the Oklahoma Court of Civil Appeals refused to consider the effect of the federal order on the validity of the lower court decisions because the federal judgment was not included in the record. Federal courts have recognized that such a failure by a court clerk or court report may result in a denial of due process when such error causes prejudice to the defendant. See ***Mitchell v. Wyrick***, 698 F.2d 940, 941 (8th Cir.1983). If a litigant demonstrates some prejudice resulting from the failure to supply a complete record on appeal, then he is entitled to relief from the federal court. ***Id***. at 942; see also ***Saathoff v. Hesse***, No. 95-1130, 1995 WL 749722, at 2 (10th Cir. Dec. 19, 1995) (unpublished order and judgment); ***Ortiz Salas v. INS***, 992 F.2d 105, 106 (7th Cir.1993); ***White v. Florida Dep't of Corrections***, 939 F.2d 912, 914 (11th Cir.1991); ***Bransford v. Brown***, 806 F.2d 83, 86 (6th Cir.1986).

In ***Conover v. State***, 1999 OK CR 26, 900 P.2d 291, the Oklahoma Court of Criminal Appeals discussed a case factually similar to the present case. In that case, the appellant filed a designation of record which included all the exhibits used during the trial of his case. When he received his copy of the record on appeal, many of the exhibits were not included. The deficiencies in the record were to violate his right to due process and the case was remanded for a properly prepared record.

It is admitted by Respondent that the federal litigation found that some documents intricately connected with the entirety of the transactions were *ultra vires*. Respondent follows this admission with the request that the Court ignore the illegitimacy of the transactions and affirm the portion of the transaction at issue in the present case.

In its objection to the sheriff's sale, Petitioner sought to enforce the conclusions of the federal court in the case pending in Canadian County; however, the trial court failed to give due consideration to the conclusions of the federal court.

The error committed by the trial court was compounded when Petitioner was denied the opportunity to obtain any level of due process on appeal when the Oklahoma Court of Civil Appeals refused to consider the effect of the federal court order on the foreclosure action. This Court should intervene and grant Petitioner's request for Certiorari.

PROPOSITION II

THE FORECLOSURE ACTION DID NOT SATISFY EVEN MINIMUM PRINCIPLES OF DUE PROCESS.

Oklahoma law is very clear with respect to the requirements that must be met in order to ensure due process prior to a judicial sale when a property is foreclosed. In this case, those minimum requirements were not met.

A. The Appraisal Process was Completely Improper.

While it is true that there were three appraisers used in the valuation process of Petitioner's property, it is very clear that these were not independent appraisers. Not only does the record fail to indicate, as required by law, the addresses of the appraisers, the addresses if revealed would all be the same. Two of the appraisers are related and all three work at the same office. These are not independent appraisers.

When Petitioner attempted a challenge to the legitimacy of the appraisals, as clearly documented in the Respondent's Brief in Opposition, the trial court essentially refused to consider the issue, indicating that one of the three appraisers was "eminently qualified." The issue of qualification was not necessarily in question. Rather, the question for the court was whether the appraisers were independent and uninvolved. The discussion by the trial court begs the question by simply focusing on the qualifications of one of the three.

When a case involves a judgment liens, Oklahoma law requires strict adherence to the state statutory procedures and that would certainly include the prerequisite appointment of the appraisers. ***U.S. Mortg. v. Laubach***, 73 P.3d 887 (Okla. 2003).

The defects in the appraisal process are well documented in the pleadings and record before this Court. They were ignored by the Oklahoma Court of Civil Appeals, which was affirmed by the Oklahoma Supreme Court.

In this case, there is no question that certain assets on the property were not included in the appraisal of the property. The trial court noted at the hearing on the Objection to the Confirmation of the Sheriff's Sale that none of the appraisals took into consideration the highest and best use of the property as a sand mine.

The judge opined that because there were no contracts in place to sell the sand mined on the property, that use of the property for its highest and best use could legitimately be ignored.

In this case, Petitioner was denied a fair and accurate appraisal of his property. The highest and best use contemplates a present existing use or one reasonably likely to take place in the near future, whereby availability of this future use would have affected the market price. ***Wilson v. United States***, 350 F.2d 901 (10th Cir. 1965). See, also, ***United States v. 1,291.83 Acres of Land***, 411 F.2d 1081 (6th Cir. 1969); ***Cameron Development Co. v. United States***, 145 F.2d 209 (5th Cir. 1944).

A landowner is entitled to have the market value of his property determined by reference to the highest and best use for which it is available. ***United States v. 91.90 Acres of Land***, 586 F.2d 79 (8th Cir. 1978), cert. denied, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). Ordinarily the highest and best use for property condemned is the use to which it is subjected at the time of the taking. However, the courts recognize that there may be circumstances that require a finding that another highest and best use exists. ***United States v. Buhler***, 305 F.2d 319 (5th Cir. 1962).

Due process, involving notice and the opportunity to be heard, is guaranteed by both the Constitutions of the United States and the State of Oklahoma. Oklahoma Courts have defined the minimum requirements for due process in many cases. Essentially, the right demands:

> an orderly proceeding adapted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with an opportunity to be heard, with full power to grant relief.

State ex rel. Oklahoma Employment Sec. Com'n v. Morrow, 877 P.2d 1182 (Okla.App. 1994), *quoting* ***Kingwood Oil Co. v. Corporation Commission***, 396 P.2d 1008 (Okla.1964) (syllabus 2).

Petitioner presented evidence to the trial court that the highest and best use of his property was as a sand mine. Evidence was presented to the trial court; however the trial court completely refused to even consider the issue. Consequently, the valuation of the property was millions less

than it should have been, allowing confirmation of the for substantially less than the property was worth.

As was true with the discussion above with respect to the consideration of the federal court decision, the failure of the Oklahoma courts to properly apply its own requirements prior to the sale of property by a sheriff is absolutely a denial of due process that may not be countenanced by this Honorable Court. Oklahoma courts failed to take the appropriate action to protect Petitioner's important constitutional rights, thus, this Court must exercise its discretion and act to make Oklahoma accountable for its failure to protect the rights of its citizens.

CONCLUSION

This case presents issues of significant importance. The decision of the Oklahoma Court of Civil Appeals violates principles of law from this Court. The Court should exercise its discretion and grant Petitioner's request for review by this Court.

Respectfully submitted,

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